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OCBC BANK (MALAYSIA) BHD

v.

AU KEE SIAN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
TENGKU BAHARUDIN SHAH JCA
MOHD NOOR ABDULLAH JCA
[CIVIL APPEAL NO: P-02-770-2002]

C

11 SEPTEMBER 2006

LAND LAW: *Charge - Order for sale - Overdraft facility - Default - Payments into borrower's account - Whether could be used to reduce or settle overdraft - Whether grant of order contrary to equity and good conscience - National Land Code, s. 256(3)*

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The appellants ('the bank') had granted overdraft and other banking facilities to a borrower upon the security of a charge created in their favour by the respondents. Subsequently, the borrower intimated to the bank that, in respect of the overdraft facility, it had resolved to continually reduce the RM380,000 limit accorded thereto. Thereupon, and for the stated purpose of reducing the overdraft limit, the borrower remitted two payments of RM50,000 each, whereof the bank reduced the overdraft limit from RM380,000 to RM280,000. The facts showed that other payments had also been remitted by the borrower but without the specific request that they be used to reduce further the overdraft limit, and that being so, such payments were left untouched by the bank. The borrower defaulted in the repayment, and the bank, having already issued the statutory Form 16D, applied for an order for sale of the charged land.

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The respondents objected and argued that it would be inequitable to grant the order, as the bank ought but failed to utilise such of the other payments remitted to reduce further the limit of the overdraft. The argument found favour with the learned judge, who therefore refused to grant the order on the ground that granting it "would be contrary to equity and good conscience". The bank appealed and the question that arose was whether the judge was right in applying the third principle as enunciated in *Low Lee Lian v. Ban Hin Lee Bank Bhd* – namely – that "a chargor may defeat an application for an order for sale by demonstrating that its grants would be contrary to some rule of law or equity".

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Held (allowing the appeal):
Per Abdul Aziz Mohamad JCA

(1) The learned judge was in error because he failed to appreciate that the bank could not use a payment to reduce the overdraft limit unless it was made specifically for that purpose. In this case, only the two payments of RM50,000 each had been made for such purpose. Further, if the overdraft limit was reduced further by a payment not made for the purpose, and consequently the borrower could not draw beyond the further reduced limit, the borrower would have cause to go against the Bank. (para 9)

(2) Had the bank actually allowed the borrower to draw on the account in excess of the overdraft limit, a question would arise whether it can be said that to grant an order for sale would, in the words of *Low Lee Lian* "be contrary to some rule of law or equity". But the question did not arise here, as there was no factual basis for the decision that to grant the order for sale would, as the learned judge thought, "be contrary to equity and good conscience". The bank rightly did not reduce the overdraft limit further than RM280,000, which limit the borrower was not allowed to exceed and did not exceed. (para 10)

[Appeal allowed. Case remitted to High Court for necessary orders]

Bahasa Malaysia *translation of headnotes*

Perayu ('bank') telah memberi kemudahan overderaf serta kemudahan-kemudahan lain kepada peminjam atas jaminan suatu gadaian yang dilaksanakan untuk manfaat bank oleh responden-responden. Peminjam kemudian memberitahu bank bahawa, berkaitan dengan kemudahan overderaf, ia memutuskan untuk mengurangkan secara berterusan had overderaf RM380,000 yang diberikan kepadanya. Berikutnya, bagi maksud mengurangkan had overderaf tersebut, peminjam memasukkan dua jumlah wang dengan setiap satu berjumlah RM50,000 ke dalam akaunnya, berakibat bank mengurangkan had overderaf dari RM380,000 kepada RM280,000. Fakta menunjukkan bahawa beberapa jumlah wang yang lain telah juga dimasukkan oleh peminjam ke akaunnya tetapi tanpa sebarang permintaan supaya ianya digunakan bagi mengurangkan had overderaf, dan oleh kerana itu, wang-wang tersebut tidak diusik oleh bank. Peminjam mungkir dalam

pembayaran balik, dan bank, yang sudahpun mengeluarkan Borang statutori 16D, memohon untuk perintah jualan tanah yang digadai. Responden-responden membantah sambil berhujah bahawa adalah tidak adil untuk membenarkan perintah jualan oleh kerana bank sepatutnya menggunakan segala bayaran yang dimasukkan ke dalam akaun peminjam untuk mengurangkan lagi had overderaf, tetapi gagal berbuat demikian. Hujah telah diperkenan oleh yang arif hakim, yang dengan itu enggan membenarkan perintah jualan dengan alasan bahawa memberinya adalah "bertentangan dengan ekuiti dan akal budi". Bank merayu dan persoalan yang berbangkit adalah sama ada hakim betul apabila menggunapakai prinsip ketiga seperti yang diperkatakan di dalam *Low Lee Lian v. Ban Hin Lee Bank Bhd* – iaitu – "sesuatu permohonan untuk perintah jualan boleh ditangkis oleh penggadai dengan menunjukkan bahawa membenarkannya adalah bertentangan dengan mana-mana aspek kedaulatan undang-undang ataupun ekuiti".

Diputuskan (membenarkan rayuan):
Oleh Abdul Aziz Mohamad HMR

(1) Yang arif hakim khilaf kerana gagal menyedari bahawa bank tidak boleh menggunakan sesuatu bayaran untuk mengurangkan had overderaf kecuali bayaran tersebut dibuat khusus untuk tujuan itu. Dalam kes di sini, hanya dua bayaran yang berjumlah RM50,000 setiap satu dibuat untuk maksud tersebut. Selain itu, sekiranya had overderaf terus dikurangkan walaupun melalui bayaran yang bukan dibuat untuk tujuan itu, dan berikutnya peminjam tidak boleh mengeluarkan wang melebihi had yang terus dikurangkan tersebut, peminjam mempunyai kausa untuk bertindak terhadap bank.

(2) Sekiranya bank ada membenarkan peminjam membuat pengeluaran melebihi had overderaf pada akaun, persoalan akan berbangkit sama ada ianya boleh dikatakan bahawa membenarkan perintah jualan, memetik kata-kata *Low Lee Lian* akan "bertentangan dengan mana-mana aspek kedaulatan undang-undang ataupun ekuiti". Bagaimanapun, persoalan sedemikian tidak berbangkit di sini, oleh kerana tiada asas fakta untuk memutuskan bahawa pemberian perintah jualan, seperti yang difikirkan oleh yang arif hakim, akan "bertentangan dengan ekuiti dan akal budi". Bank dengan betulnya tidak mengurangkan terus had overderaf sehingga ke bawah paras RM280,000, iaitu paras yang tidak boleh dilangkahi oleh peminjam dan sememangnya tidak dilangkahi olehnya.

Case(s) referred to:
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50
National Land Code, s. 256(3), Form 16D

For the appellants - Christina Siew; M/s Lim Kean Siew & Co
For the respondents - Jacy Rani Paloosamy; M/s Ong & Manecksha

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-1488-2000 (MT4)]

Reported by WA Sharif

JUDGMENT

Abdul Aziz Mohamad JCA:

[1] The appellant bank appealed against the dismissal by the High Court of their application for an order for sale under s. 256(3) of the National Land Code of the respondents' land, which had been charged to the appellants as one of the securities for loan facilities granted by the appellants to a company by the name of Meko Offset Printing Sdn. Bhd. ("the borrower"). By a unanimous decision we allowed the appeal and remitted the case to the High Court to make the order for sale and ancillary orders.

[2] The loan facilities that were granted to the borrower comprised an overdraft to a limit of RM380,000 and various other facilities, also to a limit of RM380,000. They were granted on 30 November 1990, but those limits were increased limits approved on 11 April 1991. The lending bank was Oversea-Chinese Banking Corporation Limited, which on 1 July 1994 transferred its business to the appellant bank by a transfer that was given effect to by an order pursuant to s. 50 of the Banking and Financial Institutions Act 1989.

[3] The charge of the land was registered on 22 July 1991, having been executed by the first respondent and the then other owner, Ngiam Seng Lian, who, on 8 May 1995, transferred her undivided half share to the second respondent, who then, by virtue of cl. 37 of the charge annexure, became bound by the charge.

[4] The borrower defaulting in respect of the various facilities, on 27 June 2000 the appellants served on the respondents a notice of default in Form 16D of the National Land Code. As regards the overdraft facility, the notice stated that as at 31 May 2000 the amount outstanding was RM235,094.64. I mention the overdraft facility only because the cause that the learned judge in the High Court found to exist for refusing an order for sale related to the overdraft facility. The question of the cause came about as follows.

[5] On 18 April 1995 the borrower wrote to the appellants as follows:

> We have the pleasure to inform you that during our EGM held on 6th April, 1995, we have come to resolve the followings [sic]:
>
> That the Company's bank borrowing with you, pledged under 3rd Party Charge on property at No. 34, Jalan Azyze, Tanjung Bungah, Hillside, Penang, to be reduced as follows:
>
> 1. a) by 31.12.1995 borrowing to be reduced by RM50,000.00
>
> b) by 31.12.1996 borrowing to be reduced by another RM100,000.00
>
> c) by 31.12.1997 borrowing to be reduced by another RM100,000.00
>
> d) by 31.01.1998 the property to be fully redeemed and discharged.
>
> 2. the company shall limit from issuing cheques exceeding the RM380,000.00 limit granted by your bank.
>
> Kindly abide to our above requests which shall take immediate effect from the date hereof and keep us inform (sic) from time to time on our credit limit. And also, we request you to inform the Owners of the property from time to time, as and when, the limit is scaled down.

[6] It was not in dispute that that was a request to reduce the limit of the overdraft facility. In fact, such may be inferred from para. 6 of the first respondent's affidavit dated 30 April 2002, wherein he referred to three letters, which were exhibited, to show that the appellants started to reduce the limit of the overdraft. The first was a letter dated 18 January 1996, whereby the appellants informed the borrower that they had that day reduced the overdraft limit from RM380,000 to RM330,000. Another was a letter dated 6 January 1997, whereby the appellants referred to the borrower's said letter of 18 April 1995 and requested the borrower to make payment into their account to enable the appellants to further reduce the overdraft limit as requested. The last was a letter dated 13 January 1997, whereby the appellants informed the borrower that they had that day reduced the overdraft limit from RM330,000 to RM280,000. It was not in dispute, although it was not specifically stated in the affidavits, that those two reductions of the overdraft limit by RM50,000 each time was made because the borrower made two payments each of RM50,000 in order to reduce the overdraft limit. But the first respondent, in para. 3 of his affidavit dated 11 July 2002, made an equivocal averment that sufficient moneys had been paid into the loan account to settle the debt but the appellants had continued to extend the overdraft to the borrower in excess of the agreed limits. I say 'equivocal averment' because the first respondent did not say that the payments were to reduce the limit of the overdraft further, but said that they should have settled the debt. As if to illustrate what he meant, the first respondent, by para. 5 of that affidavit, exhibited statements of account for the period 31 December 1997 to 30 September 1998 (exh. AKS 9), but without spelling out the point that he sought to make. Such being the quality of the first respondent's averments, the appellants, in para. 4 of their affidavit dated 15 July 2002, merely denied that the payments had fully settled the overdraft and maintained that they had been extending the overdraft facility to the borrower within the agreed limits.

[7] It was only in the submission of the respondents' counsel in the appeal – and a submission on similar lines would have been made in the High Court too – that it became clear that the respondents' point was that every other payment besides the two specific RM50,000 payments should have reduced the limit of the overdraft further but that did not happen and the appellants continued to allow the borrower to operate the account in excess

of what to the respondents should have been the further reduced limits. The respondents' counsel pointed to a specific example from the aforementioned statements of account (exh. AKS 9). On 18 August 1998 the account was overdrawn, or in debit, by RM279,199.26. On 28 August 1998 there was a payment of RM205,000 which reduced the debt to RM74,199.26. My understanding of the respondents' point was that the amount of the reduced debt should also have been treated by the appellants as the new overdraft limit, so that henceforth they should not have allowed the borrower to operate the account beyond the limit of RM74,199.26, but they nevertheless continued to allow the borrower to draw on the account beyond that limit, so that on 30 September 1998 the account stood overdrawn at RM198,629.96.

[8] The learned judge, who was also shown the payment of RM205,000, agreed with the respondents. He said:

> It is the defendants' contention that since this is a Third Party Charge and since the Borrower had indicated that by 31.1.98 the borrowing would have been gradually reduced so much so that by that date the said property would be fully redeemed and discharged, the plaintiff had no right to grant any further extension of the facilities on the defendants' charge. In my view the conduct of the plaintiff in giving further credit after agreeing with the Borrower's proposal as contained in the Borrower's letter dated 18.4.95, clearly has satisfied this Court that the grant of an order for sale would be contrary to equity and good conscience as envisaged under category (iii) by the Federal Court in *Low Lee Lian (supra)* …

That was the only reason for not granting the order for sale. The mention of 'category (iii)' was a reference to the judgment of the Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 that cause to the contrary within s. 256(3) of the National Land Code may be established only in three categories of cases. As regards the third category, the Supreme Court said at p. 46 b-c: 'Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity'.

[9] The appellants' counsel submitted that the learned judge was in error because he failed to appreciate that the appellants could not use a payment to reduce the overdraft limit unless it was made specifically for that purpose, and that only the two payments

of RM50,000 each had been made for the purpose. If the overdraft limit was reduced further by a payment not made for the purpose, and consequently the borrower could not draw beyond the further reduced limit, the borrower, who needed to use the overdraft as working capital for their business, would have cause to go for the appellants. The appellants' counsel emphasized that the various payments into the overdraft account that the first respondent mentioned in his affidavit were day-to-day transactions in the ordinary course of the borrower's business and were not made specifically for reducing the overdraft limit.

[10] I agreed entirely with that submission, which was perfectly sound and to which there was no answer. Had the appellants actually allowed the borrower to draw on the account in excess of the overdraft limit, a question would arise whether it can be said that, for that reason, to grant an order for sale would, in the words in *Low Lee Lian*, 'be contrary to some rule of law or equity'. But the question did not arise in this case as there was no factual basis for the decision that to grant the order for sale would, as the learned judge thought, 'be contrary to equity and good conscience'. The appellants rightly did not reduce the overdraft limit further than RM280,000, which limit the borrower was not allowed to exceed and did not exceed.

[11] That was the only point in the appeal, and as the appellants succeeded on that point the appeal was allowed and the case was remitted to the High Court to make the necessary orders.

[12] These grounds of judgment have the concurrence of my learned brother Tengku Baharudin Shah JCA. The views of Mohd. Noor Abdullah JCA have not been obtained because the draft grounds were only prepared after he had gone on retirement.